

(1963) 12 MAD CK 0025

In the Madras High Court

Case No : Appeal No. 371 of 1960

S.A.R.M. Meyyappa Chettiar

APPELLANT

Vs

Viswanathan and Another

RESPONDENT

Date of Decision : 18-12-1963

Acts Referred:

Citation : AIR 1964 Mad 349 : (1964) 77 LW 226

Hon'ble Judges : S. Ramachandra Iyer, C.J.; Ramakrishnan, J

Bench : Division Bench

Advocate : R. Sethirama Sastri, for the Appellant; A. Sundaram Iyer and V. Kannan, for the Respondent

Final Decision : Allowed

Judgement

S. Ramachandra Iyer, C.J.—This appeal is from the judgment of the Subordinate Judge of Devakottai, decreeing in part a claim made by

the appellant on the foot of a simple mortgage executed by the father of the respondents herein in favour of the appellant. The mortgage document

is dated 3-1-1955 and it purports to be executed by the father of the respondents for himself and also in his capacity as the guardian of the latter.

The amount secured under the document was a sum of Rs. 35,000, made up of (1) Rs. 29,522-1-0, an amount said to be due from the father of the

respondents to the appellant in regard to the former's dealings with the latter from 27-1-1950 to 4-1-1954 (2) Rs. 5, 231-12-0, the balance due

under a deposit letter executed by the mother of the respondents' father in favour of the appellant and (3) Rs. 246, 3-0 paid in cash. It is now

proved by evidence that the liability for the first item of consideration, namely Rs. 29,522-1-0 was in respect of the indebtedness of a coffee

business run under the name of Nathan Coffee Co. It was the appellant's case at trial that the respondents' father was carrying on business under

the name of Nathan Coffee Co. But the evidence revealed that it was not so.

The paternal grand-father of the respondents, who had been divided from his own son, namely, the father of respondents, was carrying on the

coffee business under that name. He became indebted to the appellant in that sum in connection with that business. What therefore the

respondents' father did on 3-1-1955, when he executed the mortgage document, was to take over the liability of his father to the appellant to the

extent of Rs. 29,522-1-0. Similarly, he undertook the liability of his mother, that forms the second item of consideration. Therefore although till the

date of the mortgage the respondents' father was not personally liable to pay those amounts, yet by reason of his undertaking to pay off those

liabilities under the mortgage document, he incurred a personal liability. As we said the appellant filed the suit claiming a mortgage decree. He

wanted to bind not merely the interest of the respondents' father in the mortgage properties, but of the respondents as well.

The suit was filed on 5-3-1959, at a time when the personal remedy against the respondents' father had not become barred. The respondents

contested the suit on the ground that the business in coffee run under the name of Nathan Coffee Co. not being their father's they would not be

bound to pay the mortgage debt. The learned Subordinate Judge found that beyond the recital in the mortgage document, there was nothing in the

evidence to show that the business of Nathan Coffee Co. was run by the respondents' father. We are of opinion that the finding of the learned

Subordinate Judge on that question is amply supported by the evidence in the case. We must therefore take it that Nathan Coffee Co. was a

concern of the respondents' grandfather and any liability contracted in the course of that business by him would not, as such, be binding upon the

respondents' father, as he and his father had become divided as early as 1933. That circumstance however could not prevent the respondents'

father from taking over the liability of his father. So far as the appellant is concerned, there was good consideration for the mortgage, inasmuch as

he has given discharge of the liability due from the respondents' grand father as well as the debt due by the grandmother. It would not, therefore,

be open to the respondents' father to deny his liability under the mortgage document. Indeed, it is on that footing that the learned Subordinate

judge has passed a decree against the interest of the respondents' father in the mortgaged properties.

2. But the question then is, whether, having regard to the fact that personal remedy against the respondents' father had not become barred at the

date of suit an appropriate decree could be passed, when the mortgage security is found to be insufficient after sale. The learned Subordinate

Judge has held that the respondents would not be liable to pay their father's debt as the two debts intended to be wiped off by the mortgage

document were not debts actually incurred by the respondents' father. We are unable to agree. When the creditor gave discharge of the liability of

the respondents' grandfather, the respondents' father became liable by reason of the covenants in the mortgage deed executed by him on 3-1-

1955. He being thus personally liable for the debts secured by the mortgage the doctrine of pious obligation would render the interest of the

respondents in the joint family property also liable in execution of the personal decree. In *Nidavolu Atchutam alias Achutaramayya and Others Vs.*

Ratnaji Carrying on Business under the name and Style of Ratnajee Bhootaji and Others, a similar contention was advanced but without success.

Mr. Balasubramaniam appearing for the respondents, placed strong reliance upon the decision of the Privy Council in AIR 1945 91 (Privy

Council) where the sons of a Hindu father who had executed a bond were held not liable under the theory of pious obligation. In that case one

Utham Chand executed a surety bond in favour of the Court for the due payment of a decree passed against his brother's sons. On default

occurring, the bond was sought to be enforced against the family properties of Uttam Chand. The Privy Council held that the security bond in that

case not having been executed for payment of any debt due by the father but for the payment of a debt due by a third party, the doctrine of pious

obligation of the sons to pay their father's debt would not make the transaction binding on the ancestral properties. But that was a case where no

debt as such was incurred by the father. What all he did was to undertake to guarantee the payment by a third party.

This distinction has been noticed by Panchapakesa Ayyar J: in *Maria Pillai and Another Vs. Muthukumaran and Others*, where the learned Judge

pointed out that the decision of the Privy Council would not apply to a case where consideration had been received by the father. In that case the father; was the payee under a promissory note which he endorsed for valuable consideration in favour of another person. The latter, while filing the suit against the debtor, also impleaded the endorser (payee) as a party defendant in the suit. The father died pending suit and a decree followed against the assets of the father in the hands of the sons and grandsons. The execution of the decree was sought to be resisted on the ground that the sons were not liable on any theory of pious obligation for the liability of their father, which"" was in the nature of a surety liability, he having been sought to be made liable only as an endorser. That contention was rejected in the view that there was valid consideration for the father to make him liable to the endorsee.

The present case is almost a similar one. The lather of the respondents, by reason of his taking over the liabilities of his own father and mother had rendered himself personally liable to the appellant. He thus received full and valuable consideration for this taking over those debts. Such debts cannot in any sense be regarded as Avyavaharika debts. The respondents" interest in the joint family properties will therefore be liable to pay the debt in case a personal decree is to be passed against their father (first respondent). The appeal will therefore be allowed to that extent with costs.

3. The Memorandum of cross-objections is dismissed. No costs.